CSMW

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA ex rel. : CIVIL ACTION
BRUCE BOISE, et al. :

v. :

CEPHALON, INC., et al. : No. 08-287

FILED
MAR 10 2017
KATE BARKMAN, Clerk
By ______ Dep. Clerk

ORDER

AND NOW, this 10th day of March, 2017, upon the submissions of the parties, and *in camera* review of Relator Boise's personal journal and 2008 tax return, it is ORDERED as follows[1]:

1. Cephalon's request that Relators be deemed to have waived the protections of the attorney-client privilege with respect to Relator Boise's journal is denied. The record reflects the agonizingly slow identification, entry into a privilege log, and production of hundreds of journal entries over a period exceeding one year. *See* doc. no. 179, at 2-7. Relators' proffered reasons for the delay are unavailing. For example, counsel cannot credibly argue that it was unaware of the existence of a journal it claims is protected from production, because it was created at the direction of counsel.[2] *See* doc. no. 181, at 1 n.1. Notwithstanding a change in counsel, service of discovery requests should have prompted current counsel to engage in a discussion with the Realtors sufficiently thorough to lead to the disclosure of the existence of the journal. Moreover, upon learning of the existence of the journal, counsel should have promptly and thoroughly reviewed its contents and either produced the entries as discoverable or identified them on a

[1] We write for the parties and therefore do not set forth at length the history of the current dispute. The facts are set forth in correspondence and attachments thereto docketed at nos. 179, 181, and 183.

[2] This assertion was belied by Relator Boise, who stated during his deposition "It was a practice for me to take notes in my journal all the time." Doc. no. 179, Exhibit 21, Boise N.T., 336:1-2. Additionally, he stated that he kept it, "[p]artly just to help as far as what you go through in life," and to remember the contents of his communication with third parties. *Id.*, at 109:19-110:6.

privilege log. Though Relators argue strenuously that their discovery responses were drafted and supplemented in good faith, even they admit that their efforts should have been greater. *See* doc. no. 181, at 7. Further, even if counsel, in good faith, believed the journal entries to be largely protected by attorney-client privilege, the work-product doctrine, or on some other basis, there is no reason for the long delay in identifying such entries in a privilege log as required under Fed. R. Civ. P. 26(b)(5).

The court notes Relators' counsel's contention that they initially determined, again in good faith, that the journal entries were overwhelmingly non-responsive or not relevant. This basis for non-disclosure, however, is belied by the production over time, and particularly since this court's November 2016 orders, of hundreds of previously unidentified, responsive entries.

The court is not unmoved by Cephalon's reliance on *Rhoads Indus., Ins. v. Building Materials Corp. of America*, 254 F.R.D. 216 (E.D. Pa. 2008). In *Rhoads*, the court held that plaintiff had waived the attorney-client privilege protecting documents inadvertently produced to defendants, because of the "long and inexcusable" delay in identifying the documents in a privilege log as required under Fed. R. Civ. P. 26(b)(5). *Id.* at 226. The record here arguably reflects a similar "long and inexcusable" delay in logging purportedly privileged documents. However, while the dilatory manner in which discovery relating to Boise's journal has proceeded cannot be condoned, the requested sanction of a blanket waiver of the privilege is too grave a consequence. Instead, Relators will be ordered to produce certain categories of documents identified in the logs produced to Cephalon.

Notwithstanding Realtors' assertion that materials redacted from the journals produced to Cephalon are protected and/or non-responsive, upon *in camera* review of Relator Boise's journal, Relators shall produce unredacted copies of journal entries described as follows in the privilege log:

a. finances/investments
b. budget/budgeting
c. taxes/tax issue
d. Florida residency/House in Key West
e. IRS
f. potential expenses
g. credit
h. financial planning
i. personal reflection

The court finds that the foregoing entries are: (1) not protected by the attorney-client privilege or as work product, (2) arguably responsive and relevant, and (3) discoverable, based upon proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1). Relators are directed to re-examine entries withheld and described as "non-Cephalon employees," and "personal issues," and produce relevant, non-protected materials.

2. Cephalon's request that Relator Boise produce his 2008 tax return is denied, without prejudice. Requiring production of tax records is viewed unfavorably where the information to be gleaned is available from other sources. *DeMasi v. Weiss*, 669 F.2d 114, 119 (3d Cir. 1982) (internal citation omitted). Journal entries referring or relating to the IRS have been ordered produced, *supra*. Cephalon may review these and question Relator Boise during his deposition. If, after questioning, Cephalon, in good faith, deems this level of disclosure insufficient, it may renew its motion.

3/10/17 mailed

BY THE COURT:

Carol Sandra Moore Wells

CAROL SANDRA MOORE WELLS
United States Magistrate Judge